



U.S. Department of Housing and Urban Development
Office of Public and Indian Housing

Notice

Special Attention of:
Administrators, Offices of Native
American Programs; Tribal Government
Leaders; Tribally Designated Housing
Entities

NOTICE PIH 2005-8 (TDHEs)

Issued: February 25, 2005

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SUBJECT: Limiting Housing to Indian Families or Tribal Members when using Indian
Housing Block Grant (IHBG) Funds

1. Purpose

This Notice explains when tribes or tribally designated housing entities (TDHEs) (referred to in this Notice as ‘Tribe’) may limit housing assistance to Indian families or tribal members. This notice outlines how the requirements are different if only IHBG funds are used or if IHBG funds are leveraged or combined with funds from other sources.

2. Background

The IHBG program, created by the Native American Housing Assistance and Self-Determination Act (NAHASDA), authorizes annual formula block grants to Indian tribes for affordable housing activities, to primarily benefit low-income Indian families. Section 201 (b) (5) of NAHASDA permits a preference to serve tribal members.

In general, housing recipients of federal funds (such as housing authorities) may not discriminate against program beneficiaries (renters or homebuyers) on the bases of race, color, or national origin. In addition, other laws prevent most housing providers from discriminating against renters or homebuyers based on religion, sex, familial status, or disability.

However, Section 201 (b) (6) of NAHASDA states that Title VI of the Civil Rights Act of 1964, and the Fair Housing Act “shall not apply to actions by federally recognized tribes and the tribally designated housing entities of those tribes under this Act.” This provision also applies to recipients established under the Alaska Native Claims Settlement Act and to State-recognized tribes that receive grants under NAHASDA.

3. Definitions

Affordable housing: Housing that meets the requirements of Title II of NAHASDA, including housing units developed under the United States Housing Act of 1937, housing units developed under NAHASDA, and other housing units that are not assisted under NAHASDA, but which meet the requirements of Title II of NAHASDA.

Combined Funds: For purpose of this notice, funds are considered combined when IHBG funds are used with other funds for both eligible affordable housing activities for low-income Indian families and other housing activities that may not meet the requirements of NAHASDA.

Fair Housing Act: Title VIII of the Civil Rights Act of 1968, as amended, is also called the Fair Housing Act. It prohibits discrimination in the sale, rental, and financing of dwellings, and in other housing-related transactions, based on race, color, national origin, religion, sex, familial status, or disability.

Indian Area: The area within which an Indian tribe or its TDHE, as authorized by one or more Indian tribes, provides assistance under NAHASDA for affordable housing as stated in its Indian Housing Plan (IHP).

Leveraging Funds: To access additional financing to enhance ones financial capacity. Leveraged funds, in the context of section 102(c)(3) of NAHASDA, are additional resources used with IHBG funds for affordable housing activities under NAHASDA for low-income Indian families.

Low-income family: A family whose income does not exceed 80 percent of the median income for the area, as determined by the Secretary.

NAHASDA: The Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*), as amended.

Sovereignty/civil jurisdiction: Authority to exercise governmental powers within a limited area.

Title VI of the Civil Rights Act of 1964 (Title VI): This law prohibits discrimination against beneficiaries of federally assisted programs based on race, color, or national origin (42 U.S.C. 2000 (d)).

4. Summary

In summary,

Under NAHASDA, IHBG recipients do not violate Title VI of the Civil Rights Act or the Fair Housing Act when limiting assistance to low-income Indian families or providing preference to tribal members if:

- the affordable housing project is on land where the tribe has sovereignty/civil jurisdiction regardless of any other funding that may have been used; or,
- the affordable housing project is funded solely with IHBG funds and is located on land subject to State or local law.

However,

IF the tribe uses NAHASDA funds for a housing activity **in combination with other funds that are subject to nondiscrimination laws** (such as HOME funds or USDA Rural Development funds),

AND, the project is on land where the tribe has **no sovereignty/civil jurisdiction**,

AND, **part** of the project is **outside** the scope of NAHASDA-eligible activities,

THEN, the tribe can only designate a proportionate percentage of the project for Indian families or tribal members only.

5. Role of the IHBG Recipient

The tribe and/or its TDHE must comply with NAHASDA requirements and all other applicable federal requirements, whether its housing programs are funded solely with IHBG funds under NAHASDA, or with a combination of IHBG funds and other funding sources.

6. Tribal Sovereignty

There exists a unique relationship between the United States and Indian tribes. Indian tribes have sovereignty and exercise jurisdiction over their territory and their members.

On lands where an Indian tribe exercises sovereignty, the tribe can limit housing to Indian families or tribal members regardless of the funds used to construct or otherwise assist the housing.

HUD recognizes tribal sovereignty/civil jurisdiction over tribal trust land within a reservation, other tribal trust land, individual trust or allotted land, and fee land reacquired by the tribe within the boundaries of the reservation.

7. Location of Housing Funded with IHBG Funds under NAHASDA

NAHASDA authorizes affordable housing activities in Indian areas. Assistance is not limited to reservations. Essentially, an “Indian area” under NAHASDA is anywhere a tribe undertakes affordable housing activities.

8. Ownership of Housing Assisted under NAHASDA

NAHASDA encourages the involvement of the private sector in affordable housing activities. NAHASDA’s requirement to primarily limit beneficiaries to low-income Indian families applies to all housing activities assisted with IHBG funds, regardless of who or what entity owns the housing.

9. Leveraged Funds

NAHASDA encourages using IHBG funding with other funds for affordable housing activities. When IHBG funds and other funds are used for NAHASDA-eligible activities, the funds are said to be “leveraged.”

When housing is located on land where the tribe has sovereignty/civil jurisdiction, and the housing is funded with IHBG and other federal funds (such as CDBG or HOME funds), the housing can be limited to Indian families or tribal members without violating nondiscrimination requirements.

However, when housing is located on land where the tribe **does not** have sovereignty/ civil jurisdiction, and such housing is funded with IHBG and other federal funds, tribes are limited in their authority to designate such housing as Indian-only, if the other federal funds have nondiscrimination requirements.

If this is the case, the tribe must determine which units are funded by each program, and can only designate the NAHASDA-assisted units as restricted to Indian families or tribal members. (If the units are similar in size and features, the number of units funded by each source can be determined on a pro-rata basis. Pro-rating examples can be found below.)

10. Combined Funds

If other funds (such as Low Income Tax Credits or private funding) are combined with IHBG funds but are not used for eligible affordable housing for low-income Indian families, the tribe must determine how it will meet the requirements of NAHASDA to serve only Indian families and also meet the requirements of the other programs which may require that all families must be served. The housing units funded under each program must be determined. If the housing units are located on land where the tribe has sovereignty/civil jurisdiction, there is no need to be concerned about different program requirements because the housing may be limited to Indian families or tribal members and there is no violation of Title VI of the Civil Rights Act or the Fair Housing Act.

11. Allocating Costs and Identifying NAHASDA-Assisted Units in Rental and Homeownership Projects.

Following are instructions on how to use IHBG funds, in combination with other funds, to develop housing projects that meet the requirements of each program. The examples show how to determine the minimum number of NAHASDA-assisted units in a project and how to allocate costs to the IHBG program.

The IHBG program distinguishes between those units in a project that have been assisted with IHBG funds and those that have not.

IHBG funds may only be expended for units that are or will be occupied by low-income Indian families. However, IHBG funds may be invested in a mixed-funding project to assist only a portion of the units in a project.

A. “Fixed” and “Floating” NAHASDA Designations for Housing Units

A tribe must determine the minimum number of units that will be designated NAHASDA-assisted. In general, this designation must be based on the actual NAHASDA investment in a unit or project. A tribe may choose to require that a

greater number of units be designated as NAHASDA-assisted to maximize the number of affordable units in the jurisdiction over time. A tribe may, on a project-by-project basis, choose to use either a fixed or a floating NAHASDA-assisted designation to track housing units.

A “fixed designation” means that the tribe determines from the outset which housing units are NAHASDA-assisted. For instance, in a 10-unit housing project, if the tribe designates units 1, 2, 3, 4, and 5 as the NAHASDA-assisted units, these specific units (1 through 5) remain NAHASDA-assisted units throughout the period of affordability and must be occupied by NAHASDA income-eligible families.

A “floating designation” gives a tribe the flexibility to maintain a certain number of NAHASDA-assisted units throughout the affordability period, although the specific units so designated may vary with availability. For example, the tribe could designate five units as NAHASDA-assisted units, and at any given point in time throughout the period of affordability, five units must have the NAHASDA-assisted designation, and be occupied by NAHASDA income-eligible families. Substituted units must be comparable in size and features to the originally designated units.

A system of floating units is advantageous when a tribe wants to ensure that assisted units are indistinguishable from and interchangeable with market-rate units. In addition, the system of floating units provides consistency with the system required in projects developed with Low Income Housing Tax Credits.

B. NAHASDA Project Rules

NAHASDA projects are subject to rent/homebuyer payment and occupancy requirements. A recipient shall not charge a low-income tenant or homebuyer rent/homebuyer payments that exceed 30 percent of the adjusted income of the family.

Noncompliance with the project income-targeting requirement is permissible when the non-compliance is caused by an increase in a family’s income. For example, in rental housing, if a unit is made available for occupancy by a family that is a low-income family, and their income increases, the family may stay in the unit until such time as the lease expires. In a lease-purchase agreement for existing housing or housing to be constructed, if the family is low-income at the time the agreement is entered into and the family’s income increases, the family may stay in the unit.

When a project has floating NAHASDA-assisted designations, the next comparable unit that becomes available in the project must be provided to a NAHASDA income-eligible family. That unit then becomes the NAHASDA-assisted unit, and the rent/homebuyer payment must be structured accordingly. When the income of a family in a NAHASDA-assisted unit rises above 80 percent of area median, that family may be required to pay more than 30 percent of its

income for the monthly payment, except that, in projects where NAHASDA units float, the family's monthly payment may not exceed the market rent for comparable, unassisted units in the jurisdiction.

C. Allocating costs to NAHASDA-Assisted Units

IHBG funds may only pay actual costs of NAHASDA-assisted housing.

If the units in a project are comparable (in terms of size, features, and number of bedrooms), then the actual costs can be determined by pro-rating total (NAHASDA-eligible) development costs. IHBG funds can only pay the pro-rated share of the NAHASDA-assisted units.

When units are not comparable, the tribe must allocate the NAHASDA costs on a unit-by-unit basis, charging only actual costs to the IHBG program, as described below. Because units in projects with the floating NAHASDA designation must be comparable, a tribe should always pro-rate costs in these projects. When units are generally comparable but vary slightly in size or amenities, a combination of the two approaches may be used.

The basic considerations for allocation costs to NAHASDA-assisted units are as follows:

(1) *Comparability in Unit Size.* Comparability in size is defined by the bedroom count and square footage of individual units. Not all units with the same number of bedrooms are comparable in size. If there is a substantial difference in the square footage of two units with the same number of bedrooms, the units are not considered comparable.

(2) *Amenities.* Comparability in amenities means similar fixtures, appliances and other features. In many mixed-income projects, to demand varying rents, the quality and types of amenities may vary among units. For instance, a project manager can demand a higher rent for a unit with wall-to-wall carpeting, garbage disposal, dishwasher and finer fixtures than for a unit without these amenities. This type of project does not typically have comparability of units, unless there is an equal distribution of assisted and non-assisted units that have these amenities.

(3) *Maximum per unit cost limit.* The average per-unit NAHASDA investment (whether it is derived on a unit-by-unit cost allocation basis, or as a pro-rated share of the total costs) may not exceed the NAHASDA maximum per unit cost limit.

Housing developed, acquired, or assisted under NAHASDA is subject to limitations on cost or design standards. IHBG-assisted housing must meet the moderate design requirements.

When a tribe is pro-rating costs, the total **NAHASDA investment** (including acquisition, development hard costs to construct or rehabilitate, and project soft costs), **divided by the number of NAHASDA-assisted units, equals the per unit NAHASDA investment**, which cannot exceed the NAHASDA maximum per unit cost limit.

When actual costs are allocated on a unit-by-unit basis, the actual per unit cost may not exceed the NAHASDA maximum per unit cost limit.

(4) *Common Costs*. Common costs are costs incurred for acquisition of improved or unimproved real property that benefit all residents of units in a project; rehabilitation or construction of shared systems (heating, plumbing, roofing) or shared facilities (community rooms, laundry facilities located in residential buildings); and on-site improvements. Costs associated with a project's on-site management office or the apartment of a resident manager may also be counted as common costs. The manner in which the costs for common elements of a project may be charged is dictated by the method chosen for allocating costs.

D. Pro-Rating Cost Allocation Method

To use the pro-rating method of allocating costs, there must be comparability between the total inventory of NAHASDA-assisted and non-assisted units in a project.

For example, consider a 12-unit building in which 6 of the units have one bedroom and 6 have two bedrooms. The one-bedroom units are all comparable to each other and the two-bedroom units are all comparable to each other. Half of the building is NAHASDA-assisted. In this case, there should be an equal proportion of one- and two-bedroom units designated as assisted and non-assisted—three one-bedroom units, and three two-bedroom units.

Another example: consider the same 12-unit building in which one-third of the units are NAHASDA-assisted. You would need a total of four units designated (one-third of 12), so you must designate two one-bedroom units, and two two-bedroom units.

When assisted and non-assisted units are comparable, total eligible development costs (including acquisition, development hard costs to construct or rehabilitate the unit, and project soft costs), may be pro-rated to determine the NAHASDA share of the total costs.

Thus, all eligible project costs may be distributed between the IHBG program and other funding sources, provided that the NAHASDA share does not exceed the maximum per unit limit. This means NAHASDA can pay any eligible cost, and

the tribe can pro-rate the NAHASDA share in relation to the total eligible costs to determine the minimum number of NAHASDA-assisted units.

For example, consider a tribe that buys land with \$100,000 in IHBG funds. Then, that tribe uses \$900,000 of private funds to construct a housing project on that land. The total cost of the project is \$1 million. A minimum of one-tenth of the units in the project must be designated as NAHASDA-assisted, because IHBG funds provided one-tenth of the total funding.

If the assisted and non-assisted units are comparable in size and distribution, a prorated share of the cost of common elements attributable to the NAHASDA-assisted units may be paid with IHBG funds.

For example, consider a tribe with a 24-unit building with 8 NAHASDA-assisted units (one-third of the units). The assisted units are comparable to the non-assisted units. The tribe replaces the heating system and the roof. In this case, the tribe may pay one-third of these total common costs with NAHASDA funds because one-third of the units are NAHASDA-assisted.

The ratio of the NAHASDA investment to the total eligible development cost is equivalent to the ratio of the minimum number of units that must be NAHASDA-assisted to the total number of units.

For example, a tribe buys and rehabilitates a 60-unit vacant building. The units are comparable. Total acquisition and development costs are \$1 million, and the tribe uses \$200,000 of IHBG funds. The IHBG investment, \$200,000, is one-fifth of the total, \$1 million; so, one-fifth of the units must be designated as NAHASDA-assisted. One-fifth of 60 units is 12 units. Therefore, 12 units must be designated as NAHASDA-assisted and 48 can be designated as non-assisted.

E. Unit-by-Unit Cost Allocation Method

When NAHASDA-assisted and non-assisted units in a project are NOT comparable, the tribe must determine and charge the IHBG program for the actual costs incurred for the acquisition and development of the NAHASDA units, plus any common costs that can be attributed to the NAHASDA portion of the project.

To allocate these costs, the tribe must designate the NAHASDA-assisted units and track the costs for each unit.

Common costs attributable to NAHASDA-assisted units are determined by calculating the total square feet in NAHASDA units as a percentage of the total square feet in the project. IHBG funds can pay for that percentage of the common costs.

The actual cost for each unit is charged to the IHBG program, provided the actual cost does not exceed the maximum per unit limit. The actual cost is charged, regardless of whether it is more or less than the pro-rated cost would be.

For example, a tribe proposes to construct a new 60-unit, mixed-income development:

- One-third, or 20, of the units will be luxury units, with total development costs of \$2 million.
- Another third, 20 not so luxurious units, will be marketed to middle-income families (between 100 and 120 percent of the area median income), with total development costs of \$1.5 million.
- The final third will be 20 basic units with few amenities and will be marketed to low-income families; the total development costs are \$1 million.

Because the units in this project are not comparable, the tribe may only use IHBG funds for the cost of the units that will meet the NAHASDA requirements. Therefore, it may invest up to \$1 million in IHBG funds to construct the 20 units for eligible low-income families, provided that the tribe's per unit limit equals at least \$50,000. All 20 units will be designated as NAHASDA-assisted.

In another example, a tribe proposes to use IHBG funds and local funds to rehabilitate a 15-unit building it already owns. Ten units are two-bedroom and are non-assisted; five units are efficiencies and are NAHASDA-assisted. In this case, NAHASDA can only pay the actual rehabilitation costs, up to the per unit limit, of the units designated as NAHASDA-assisted.

12. Additional Information

If you have any questions, or require further information, please contact your Area Office of Native American Programs (ONAP).

_____/s/_____
Michael Liu, Assistant Secretary
Public and Indian Housing

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